In the High Court of Judicature for Rajasthan

Jaipur Bench

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Cr. Misc. Petition No.996/2001

Shyam Behari & Smt. Kamlesh ***Versus*** State

Date of Order ::: 05/10/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. Rajesh Chodhary for Mr. Biri Singh, for petitioners (accused)
Mr. Arun Sharma, Public Prosecutor for State.

Instant petition U/s 482, CrPC is directed against order dt.20/01/2001, whereby Addl. Chief Judl. Magistrate No.4, Bharatpur allowed application dt.15/09/2000 U/s 319, CrPC filed by prosecution and instant petitioners have been made additional accused for offences U/s 323 & 341, IPC in pending criminal case No.173/99 arising out of FIR No.651/96.

Complainant Ramkumar Sharma who happens to be a lawyer by profession lodged written report on 23/12/96 at P.S. Mathura Gate (Bharatpur) where FIR-651/96 was registered and it has been inter-alia alleged therein that while he was sitting in his house, his cousin brother, Shyam (paternal uncle's son) came and started hurling abuses against his mother & sister, to which he refuted and intended to inflict lathi blow, therefore, he entered into his house but

Shyam & Satish followed; started beating by kicks; and pulled him out of house upto street where Satish inflicted brick blow causing injuries to his leg while Shyam inflicted lathi on his shoulder; and on hearing hullabaloo, Madanmohan alongwith his wife (his paternal uncle & aunt) reached there and they also started beating with kicks and his aunt (Smt. Kamlesh) caught hold of his hairs and inflicted beatings with kicks & bricks and in course of beating, Shyam took Rs.150/- out of his pocket while Satish snatched his silver ring.

After investigation, police filed charge sheet U/s 173 CrPC only against accused ManMohan & Satish only. After framing of charges, no effective proceedings have taken place as no prosecution witnesses were examined for almost two years; therefore, application was filed on 25/08/2000 by accused party to close prosecution evidence. However, immediately statements of complainant Ramkumar, his witnesses Umesh Chand & Kamal Kishore were recorded on 25/08/2000 & 06/09/2000 and the evidence of other prosecution witnesses was over and when the trial, itself, has ripen for final hearing and its conclusion, an application was filed U/s 319 CrPC by

prosecution on 15/09/2000 with the prayer that legal evidence having come on record prima facie constitutes commission of offence on the part of instant petitioners who be made additional accused in criminal case pending trial arising out of FIR No.651/96. Reply to the said application U/s 319, CrPC was also filed by accused party on 27/09/2000. After taking note of material on record, learned trial Judge took cognizance against petitioners as well and ordered to produce petitioners vide order dt. 20/01/01. Hence this petition.

Counsel for petitioners submits that despite the fact allegedly disclosed in FIR instant FIR-651/96 and statement of Ramkumar recorded U/s 161, CrPC, besides other material collected during investigation, the police has not considered to file charge sheet against instant petitioner and that apart even on filing challan and negative final report in favour of instant petitioners, neither protest petition nor objections were filed at the instance of complainant; inasmuch as there was no legal evidence come on record in course of trial on which even prima facie opinion could be expressed of petitioners being involved in the incident

which was taken note of by trial Judge on a perusal of statements of prosecutions witnesses including of complainant, Umesh Chand & Kamal Kishore; as such cognizance taken of offences U/s 323 & 341, IPC against petitioners herein is totally unwarranted and deserves to be quashed & set aside.

Counsel further submits that for self same incident of 23/12/96, cross FIR No.649/96 was also lodged on 23/12/96 at the instance of present accused party at PS Mathura Gate (Bharatpur) wherein also trial is at the verge of final hearing & its conclusion, inasmuch as in instant case (FIR No.651/96) after evidence was finally recorded of prosecution and defence, as well while the trial, itself, stood ripen for hearing & its conclusion, at this belated stage, the prosecution filed application U/s 319 CrPC only with an oblique motive so that the trial in criminal case arising out of FIR No.649/96 lodged against instant complainant (Ramkumar) having ripen for its conclusion can be deferred by this method, for which complainant has been finally able to achieve his goal; therefore, powers U/s 319 CrPC exercised by learned trial Magistrate making petitioners herein as additional accused

is not only legally sustainable but also deserves to be set at naught.

Counsel further submits that all such incriminating circumstances taken note of by trial Magistrate while passing order impugned were part of material appended to the challan, itself and on the basis of evidence having come on record during trial, no inference could be drawn against petitioner. In support of contention, Counsel placed reliance on the judgment of Apex Court in **Mohd. Shafi Vs. Mohd Rafiq (JT 2007(5) SC 562**).

Public Prosecutor while supporting the finding recorded under order impugned submits that there is sufficient legal evidence come on record during trial as such no error has been committed in taking cognizance of offence U/s 323 & 341, IPC against petitioners.

This Court has considered contentions of both the parties and with assistance, examined material on record. Scope of Section 319, CrPC has been examined by Apex Court in **Municipal Corp. of Delhi (1983(1) SCC 1)** followed in **Mohd. Shafi Vs. Mohd. Rafiq (supra)** ad infra:

"**19.** In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really un-extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the Court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos. 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

In **Lokram Vs. Nihal Singh (2006(1) SCC 192**) Apex Court observed ad infra:

> **"10**. On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. Of course, as evident from the decision reported in **Sohan Lal and others v. State of Rajasthan, (AIR 1990 SC 2158)** the position of an accused who has been discharged stands on a different footing."

In **Mohd. Shaif Vs. Mohd. Rafiq** (supra)

Apex Court observed ad infra:

> "**13.** From the decisions of this Court, as noticed above, it is evidence that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of cross examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence."

In view of what has been observed (supra), it is clear that power U/s 319 CrPC can be exercised either by Court on its own or on an application by some one including the accused already before it to summon other person appearing to be guilty of offence. Such power U/s 319 CrPC is extra ordinary conferred on the Court to use very sparingly and only on compelling reasons, if exist, for taking cognizance against other person against whom action has not been taken and only if there exists a possibility that the accused so summoned in all likelihood would be convicted.

However, Section 319 CrPC contemplates

consideration of legal evidence appearing in course of trial which is sufficient to make out prima facie material which may satisfy ingredients constituting offence for prosecution whereof, such person can be sought to be summoned.

It is also true that Court at this stage is not called upon to appreciate such material sought for consideration in exercise of jurisdiction U/s 319 CrPC with a view to evaluate as to whether such an evidence is sufficient for ultimate conviction for such a person sought to be summoned for prosecution invoking S.319 CrPC.

As regards merits of instant case, indisputably, cross FIR-649/96 was lodged, against instant complainant at the instance of accused party for self-same incident of 23/12/96 wherein, instant complainant is facing trial as an accused as well and the trial in both the cross cases are at the verge of its conclusion and at the belated stage, application U/s 319 CrPC has been filed while evidence of prosecution and defence stands closed, which shows oblique motive to defer the conclusion of trial in cross case (FIR-649/96). That apart, this fact cannot be ruled out that during statement recorded U/s

161 CrPC and in course of investigation, as well the investigating officer did not consider it to file charge sheet against instant petitioners despite their names in the FIR & statement U/s 161 CrPC and moreover even against negative final report in favour of instant petitioners, complainant neither filed protest petition nor raised any objection thereto. Whatever allegations made in statement of complainant or his witnesses recorded during trial – all were part of charge sheet itself and even after inquiry & investigation, petitioners had not even been considered to be arrayed as an accused at the time of filing charge sheet; on the basis whereof, no inference could have been drawn about incriminating circumstance pointer to involvement of petitioners with the incident impugned.

Only fact having come in statement particularly of Ramkumar (complainant) & Umesh Chand either referred to in application U/s 319 CrPC, or taken note of by trial Judge for taking cognizance of offence against petitioners vide order impugned, was to the effect that their versions given out during trial & interrogation is pointer to involvement of petitioners as well

in the incident of beating took place on 23/12/96, besides accused already facing trial.

However, statements taken note of by trial Judge, even if incriminating any body like petitioners, cannot otherwise be read to establish criminal liability of some other person as referred to in S.319 CrPC and except prosecution witnesses (supra), no other evidence has been referred to in application U/s 319 CrPC – a bare perusal whereof depicts that prosecution has made an attempt at the instance of complainant with the intention to defer trial in cross case and on the said premise, no inference of their involvement can be presumed.

In the opinion of this Court, no direct or indirect legal evidence came on record during trial, on which inference can be drawn against petitioner pointer to the offence of which cognizance has been taken under order impugned. This Court has also gone through the record particularly statement of prosecution witnesses taken note of by trial Judge and does not find any sufficient evidence to prima facie satisfy of commission of offence against petitioners who are sought to be prosecuted while taking cognizance by trial Judge in exercise of jurisdiction U/s

319 CrPC.

Consequently, misc. petitions succeeds and and is hereby allowed alongwith stay petition No.757/01. Order dt.20/01/01 of Addl. Chief Judl. Magistrate, No.4, Bharatpur in Cr.Case No.173/99 with regard to cognizance taken of offences U/S 323 & 341, IPC against petitioners (Shyam Behari & Smt. Kamlesh), is hereby quashed and set aside. The trial court is directed to expedite the trial in accordance with law.

(**Ajay Rastogi), J.**

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